

83-866

No. - .

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**In the
Supreme Court of the United States.**

OCTOBER TERM, 1983.

BOSTON FIREFIGHTERS UNION, LOCAL 718,
PETITIONER,

v.

BOSTON CHAPTER, N.A.A.C.P, INC., ET AL.,
RESPONDENTS.

**Petition for a Writ of Certiorari to the United States Court
of Appeals for the First Circuit.**

JOHN F. McMAHON,
Counsel of Record,
E. DAVID WANGER,
ANGOFF, GOLDMAN, MANNING, PYLE,
WANGER, & HIATT, P.C.,
44 School Street,
Boston, Massachusetts 02108.
(617) 723-5500

Question Presented.

Is the case moot in light of 1982 Mass. Acts, c. 190, § 25?

Parties.

The caption identifies all parties to the proceeding in the Court of Appeals for the First Circuit whose judgment is sought to be reviewed. They are the same parties to the earlier proceedings in this Court on writ of certiorari, Nos. 82-185, 82-246, and 82-259. The city of Boston and its Fire Commissioner were parties in the District Court proceeding but took no appeal from the District Court decision.

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v.

BOSTON CHAPTER, N.A.A.C.P, INC., ET AL.,
RESPONDENTS.

**Petition for a Writ of Certiorari to the United States Court
of Appeals for the First Circuit.**

Boston Firefighters Union petitions for a writ of certiorari to the United States Court of Appeals for the First Circuit, requesting this Court to review the First Circuit's judgment in *Boston Chapter, N.A.A.C.P. v. Beecher*, Nos. 81-1642, 81-1650, 81-1651 and 81-1656 (1st Cir. August 31, 1983).

Opinions Below.

The consolidated opinion on remand of the United States Court of Appeals for the First Circuit is not reported and is reproduced at pages 1a-9a of the appendix hereto.

The opinion on remand follows this Court's *per curiam* order in Nos. 82-185, 82-246 and 82-259. Other relevant opinions of the courts below are reported at 679 F.2d. 965 (1st Cir. 1982) and at 522 F. Supp. 873 (D. Mass. 1981) and are reproduced at pages A1 through A38 of the petition for writ of certiorari in No. 82-185.

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on August 31, 1983. This petition was filed within ninety (90) days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved.

The constitutional provision is United States Constitution, Art. III, § 2, cl. 1.

The statute is 1982 Mass. Acts, c. 190, § 25.

The text of these provisions is set forth at pages 8a, 9a of the appendix.

Statement of the Case.

A. *Relevant Prior Proceedings.*

An August 7, 1981 order of the District Court enjoined layoffs of Boston firefighters in any manner that would reduce the percentage of minority officers below the 14.7% level obtaining at the commencement of the layoffs in July, 1981. 522 F. Supp. 873 (D. Mass. 1981). Senior non-minority firefighters, entitled by length of service (seniority) to retain their jobs, were terminated. The Court of Appeals affirmed. 679 F.2d 965 (1st Cir. 1982). This Court granted certiorari on November 1, 1982. 459 U.S. ___, 103 S.Ct. 293 (1982). On May 16, 1983, after argument, this Court ruled, in part:

Following the Court of Appeal's decision, Massachusetts enacted legislation providing the City of Boston with new revenue, requiring reinstatement of all police and firefighters laid off during the reductions in force, securing these personnel against future layoffs for fiscal reasons and requiring the maintenance of minimum staffing levels in the police and fire department through June 30, 1983. *See*, 1982 Massachusetts Acts, c. 190, § 25. In light of these changed circumstances we vacate the judgment of the Court of Appeals and remand for consideration of mootness in light of 1982 Mass. Acts, c. 190, § 25.

B. *The Judgment of the Court of Appeals Upon Remand.*

On August 31, 1983, the Court of Appeals entered judgment vacating the District Court's August 7, 1981 order and remanding with directions to dismiss the plaintiff minority firefighters' motion for modification as moot. *Per curiam*, it

explains that the 1982 State Tregor Act's mandatory reinstatement feature and its now expired minimum staffing level feature abated the stake of the junior minority firefighters in their effort to prevent seniority based layoffs. In the First Circuit's view, vacatur of the August 7, 1981 order removed any inhibition on the State Civil Service Commission respecting back pay claims of senior laid off firefighters.¹ The First Circuit admits that a definitive ruling on the constitutionality² of the District Court's order "might facilitate" the Civil Service Commission's resolution of back pay claims. However, in its view, that ruling would be advisory and, as such, impermissible. The First Circuit acknowledges that "[a]ppellants' interest in the resolution of this case shows that the issue here may retain some collateral vitality, but to avoid mootness a case must present live issues and parties with legally cognizable interests"; junior minority firefighters lacked such a personal stake and "[t]he Civil Service Commission must therefore be left to decide the back pay claims under the governing

¹The District Court's order stated:

4. In the event that a firefighter's appeal of his termination to the defendant members of the Massachusetts Civil Service Commission challenges the method of termination set forth herein, the defendant members of the Civil Service Commission are hereby restrained and enjoined from disapproving, invalidating or interfering with the termination on that basis.

(App. 156.) ("App." cites to the record appendix in First Circuit Nos. 81-1642 and 81-1656.)

²The dispute with the August 7, 1981 order extended also to federal statutory issues under 42 U.S.C. §§ 1981, 1983, and 1988, and §§ 703(a), 703(h), and 706(g) of the Civil Rights Act of 1964, as amended (CRA), 42 U.S.C. §§ 2000e-2(a), 2000e-2(h) and § 2000e-5(g); e.g., Brief for Petitioner Local 718 at 13-25, Nos. 82-185, 82-246, and 82-259; Amicus Brief For United States, at 12-25, *id.*; Amicus Brief for AFL-CIO, at 2-30, *id.*; and Amicus Brief for the Equal Employment Advisory Council.

state law without an advisory resolution of the constitutional issue by the federal courts."

C. The Persisting Consequences of the August 7, 1981 Order.

1. The August 7, 1981 Order.

The order enjoined the Fire Commissioner from "reducing, pursuant to any departmental or city program of reductions . . . , the percentage of minority firefighters . . . below [14.7%] of all firefighters" (App. 155), and required establishment and use of racially separate seniority list for ratio layoffs and rehires to maintain this 14.7% level. *Id.* "To this extent, . . . the district court's order superseded the operation of the reverse seniority layoff provisions of the Massachusetts civil service statute. . . ." 679 F.2d at 973.

2. The Layoffs.

Early in July, 1981, Boston implemented an announced program of 207 terminations from its fire department.³ It initiated its program by seniority in compliance with Mass. Gen. Laws c. 31, §§ 33 and 39 and, on July 8, 15, 22, 29 and August 5, 1981, there occurred seniority-based layoffs of 173 firefighters, of whom 81 were black or Spanish-surnamed persons. A sixth wave of 34 firings, to have occurred August 12, 1981, included 32 minority persons (J.A. 42a-44a).⁴ If the announced layoffs observed the statute's seniority rule, 94 non-minority and 113 black and Spanish-surnamed firefighters, all hired in 1978 and later, would have been terminated.

³The number of terminations exceeded the city's announcements; 257 terminations occurred.

⁴"J.A." identifies references to the Joint Appendix in U.S. Supreme Court Nos. 82-185, 82-246, and 82-259.

Since the August 7 order allowed termination of not more than 38 minority firefighters of the 257 Boston firefighters separated, 125 senior firefighters entitled by statute to employment lost it.⁵

3. The Civil Service Appeals.

All firefighters terminated during the city's program filed appeals to the Civil Service Commission, (CSC) pursuant to Mass. Gen. Laws c. 31, § 41. Since the fall of 1981, appealing firefighters and the city of Boston have been engaged in extensive hearings and conferences before a CSC hearing officer involving fiscal, safety and workload, seniority and procedural issues. The 125 senior non-minority firefighters urge that their terminations violated the seniority terms of § 39 of Mass. Gen. Laws c. 31. The city of Boston asserts that the August 7, 1981 order extinguished such rights during its term and that under that order's compulsion, "just cause" existed for the termination of these 125 senior firefighters.

4. Post-"Tregor" Developments.

Upon enactment of 1982 Mass. Acts, c. 190, § 25, all available terminated personnel were rehired by June 30, 1982. Boston Fire Department General Order #46. Reinstatement, however, did not end continuing disadvantages to senior personnel due to the layoffs. Firefighters are paid annual salary increments and some senior firefighters, with enough statutory

⁵The data before the court (J.A. 43a-45a) depicts these consequences: Boston had to recall and retain all minority firefighters hired in 1978 and 7 hired in 1979 and to terminate all 92 non-minority firefighters hired in 1978 and 25 hired in 1977; 83 senior non-minority firefighters went to the street as substitutes; yet a seventh wave, not described in either appendix, saw another 42 senior employees substituted for layoffs.

seniority to withstand layoff if the statute had prevailed, are retarded in step movements. The city justifies these deprivations on the basis that the firefighters were not "on the active payroll."

Reasons for Granting the Writ.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

This case is not moot if intervening events have *not* "completely and irrevocably eradicated the effects" of the August 7, 1981 order. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). Here effects are still chronic when the city of Boston urges that the August 7, 1981 order constitutes "just cause" to defeat seniority-based back pay claims. The Court of Appeals admits that a definite ruling on the federal issues will influence the ultimate disposition of these seniority pay claims. Its admission demonstrates that effects of the August 7, 1981 order persist. Its admission is coupled with an acknowledgement that "the issue here may retain some collateral vitality." Thus when seniority back pay claims are still influenced, and perhaps determined, by the disputed August 7, 1981 order, the second *Davis* condition is not satisfied. Parties still retain "a legally cognizable interest in the outcome" which can be decisive on their entitlements and a live controversy exists presenting adverse legal interests. *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (*per curiam*), quoting *United States Parole Comm'n v. Geraghty*, 455 U.S. 388, 396 (1980) and *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

A case is not moot when present or future consequences can be reached by a judgment, *Sibron v. New York*, 392 U.S.

40, 54-56 (1968) or if an official act has residual force impairing a present interest. *Accord Diffenderfer v. Central Baptist Church of Miami, Florida, Inc.*, 404 U.S. 412, 415 (1972). Decisions of this Court establish that collateral consequences of an expired act conserve challenges from mootness. *Sibron v. New York*, *supra*; *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968). Senior firefighters have a very substantial present stake in a judgment that may be determinative of their back pay claims ensuing from implementation of the August 7, 1981 order. If a complaining party on appeal demonstrates the fact or possibility of adverse present effects of a lower court order, the decisions of this Court require the conclusion that the appeal is not moot. Such adverse present effects persist, as the Court of Appeals recognizes, because of complications and impacts of the order upon relief in the Civil Service Commission proceedings. So long as Civil Service Commission remedies can be influenced to the disadvantage of senior firefighters, a "live controversy" exists that may be determined by a federal judgment resolving a present "legally cognizable interest in the outcome" of the back pay proceeding. *Powell v. McCormack*, *supra*, 395 U.S. at 496. There remains a controversy "definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937). Although the City of Boston was never a petitioner or appellant, it remains a party with legal interests adverse to senior firefighters' interest.

Conclusion.

The writ should issue and this Court, pursuant to Rule 23.1, should enter a summary order reversing the judgment of the Court of Appeals and should decide the merits of Nos. 82-185, 82-246 and 82-259.

Respectfully submitted,
JOHN F. McMAHON,
Counsel of Record,
E. DAVID WANGER,
ANGOFF, GOLDMAN, MANNING,
PYLE, WANGER & HIATT, P.C.,
44 School Street,
Boston, Massachusetts 02108.
(617) 723-5500

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Appendix A.

**United States Court of Appeals
for the First Circuit.**

No. 81-1642

BOSTON CHAPTER, NAACP, ET AL.,
PLAINTIFFS, APPELLEES,

v.

NANCY B. BEECHER, ET AL.,
DEFENDANTS, APPELLEES.

BOSTON FIREFIGHTERS UNION, LOCAL 718,
INTERVENOR, APPELLANT.

No. 81-1650

PEDRO CASTRO, ET AL.,
PLAINTIFFS, APPELLEES,

v.

NANCY B. BEECHER, ET AL.,
DEFENDANTS, APPELLEES.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
INTERVENOR, APPELLANT.

NO. 81-1651

PEDRO CASTRO, ET AL.,
PLAINTIFFS, APPELLEES,

v.

NANCY B. BEECHER, ET AL.,
DEFENDANTS, APPELLANTS.

No. 81-1656

BOSTON CHAPTER, NAACP, ET AL.,
PLAINTIFFS, APPELLEES,
v.

NANCY B. BEECHER, ET AL.,
DEFENDANTS, APPELLEES.

CIVIL SERVICE COMMISSION, ET AL.,
DEFENDANTS, APPELLANTS.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Andrew A. Caffrey, *U.S. District Judge*]

Before

Campbell, *Chief Judge*,
Bownes, *Circuit Judge*,
and Perez-Gimenez, * *District Judge*.

Thomas A. Barnico, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, *Thomas R. Kiley*, First Assistant Attorney General, *E. Michael Sloman*, Assistant Attorney General, and *Marc S. Seigle*, Special Assistant Attorney General, were on brief, for Commonwealth of Massachusetts.

John F. McMahon, with whom *E. David Wanger*, and *Angoff, Goldman, Manning, Pyle & Wanger, P.C.* were on brief, for Boston Firefighters Union, Local 718.

* Of the District of Puerto Rico, sitting by designation.

Frank J. McGee, with whom *Law Office of Frank J. McGee* was on brief, for Boston Police Patrolmen's Association, Inc.

James S. Dittmar, with whom *Peggy A. Wiesenberg*, *Richard H. Lavin*, *Matthew D. Baxter* and *Widett, Slater & Goldman* were on brief, for plaintiffs, appellees.

August 31, 1983

PER CURIAM. This case is before the court on remand from the Supreme Court for consideration of mootness. The facts and prior proceedings are fully traced in this court's previous opinion, *Boston Chapter, NAACP v. Beecher*, 679 F.2d 965 (1st Cir. 1982). Since 1975, the Boston police and fire departments have been subject to consent decrees requiring preferential hiring of minorities to relieve the effects of prior discrimination. In 1981, facing proposed fiscal layoffs which would substantially vitiate any progress made under the decrees, plaintiffs sought and obtained modification of the original decrees. *Castro v. Beecher*, 522 F. Supp. 873 (D. Mass. 1981). The modifying order prohibited both Boston departments from reducing minority percentages in their workforces, with the practical result that non-minority firemen and police officers would have to be laid off before junior [*sic*] minority firemen and police officers notwithstanding the state's last-hired, first-fired statute.

The modification was affirmed on appeal to this court in the above-cited case, and defendants obtained certiorari from the Supreme Court. Meanwhile, however, Massachusetts enacted the so-called Tregor Act mandating reinstatement of all police and firefighters laid off during the reduction in force. See 1982 Mass. Acts, c. 190, § 25. The Supreme Court therefore

vacated this court's judgment and remanded for consideration of mootness.

"The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review" *Roe v. Wade*, 410 U.S. 113, 125 (1973); *Golden v. Zwickler*, 394 U.S. 103 (1969). When, as here, intervening acts destroy the interest of a party to the adjudication, the case is mooted, *DeFunis v. Odegaard*, 416 U.S. 312 (1974). The Tregor Act's mandatory reinstatement of the laid off police and firefighters and its requirement of minimum staffing levels through June 30, 1983 removed plaintiffs' stake in the proceeding which they had instituted in 1981 at a time when layoffs were taking place.

This is not an example of the "voluntary cessation of allegedly illegal conduct" which does not render a case moot. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Rather the city of Boston has acted pursuant to a supervening state statute. Furthermore, the case does not present a question "capable or [sic] repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). Future layoffs might occur, but there is no reason to assume that a similar state enactment would once again render the case moot before resolution by the Supreme Court.¹

Appellants' contention that the case remains alive because the modifying order prohibits the adjudication of state Civil Service Commission claims for back pay is not persuasive. According to the established practice of the federal courts, when a case is found moot, the district court's judgment will be vacated. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Thus even assuming, which we do not decide, that the

¹ The Supreme Court has granted certiorari on a case presenting the same issue as the case before us. *Stotts v. Memphis Fire Department*, 679 F.2d 541 (6th Cir. 1982), cert. granted, 51 U.S.L.W. 3871 (June 6, 1983) (No. 82-229). Thus that question may be resolved within the near future.

district court's order directly inhibits the state Civil Service Commission respecting the back pay claims, it will no longer do so. To be sure, a definitive ruling on the constitutionality of the district court's past order might facilitate the Civil Service Commission's resolution of the back pay claims. But such a ruling now — rendered in the absence of a present case or controversy in this proceeding — would amount to no more than an advisory opinion. The federal courts are forbidden by Article III of the Constitution from giving advisory opinions. See, e.g., *North Carolina v. Rice*, 404 U.S. 244 (1971); *St. Pierre v. United States*, 319 U.S. 41 (1942). Appellants' interest in the resolution of this case shows that the issue here may retain some collateral vitality, but to avoid mootness a case must present both live issues and parties with legally cognizable interests. *United States Parole Commission v. Geraghty*, 445 U.S. 388, 396 (1980). Plaintiffs now lack the "personal stake" necessary to keep alive the controversy which engendered this proceeding. The Civil Service Commission must therefore be left to decide the back pay claims under the governing state law without an advisory resolution of the constitutional issue by the federal courts.

Accordingly, we vacate the district court's order of August 7, 1981 and remand to the district court to dismiss as moot the motion for modification, without prejudice to further actions under the district court's continuing jurisdiction to monitor the original consent decrees. *Crowell v. Mader*, 444 U.S. 505, 506 (1980); *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 415 (1972); *Romero-Barcelo v. Brown*, 643 F.2d 835, 862 (1st Cir. 1981).

Vacated and Remanded.

Appendix B.

**United States Court of Appeals
for the First Circuit.**

No. 81-1642

BOSTON CHAPTER, NAACP, ET AL.,
PLAINTIFFS, APPELLEES,

v.

NANCY B. BEECHER, ET AL.,
DEFENDANTS, APPELLEES.

BOSTON FIREFIGHTERS UNION, LOCAL 718,
INTERVENOR, APPELLANT.

No. 81-1650

PEDRO CASTRO, ET AL.,
PLAINTIFFS, APPELLEES,

v.

NANCY B. BEECHER, ET AL.,
DEFENDANTS, APPELLEES.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
INTERVENOR, APPELLANT.

No. 81-1651

PEDRO CASTRO, ET AL.,
PLAINTIFFS, APPELLEES,

v.

NANCY B. BEECHER, ET AL.,
DEFENDANTS, APPELLANTS.

No. 81-1656

BOSTON CHAPTER, NAACP, ET AL.,
PLAINTIFFS, APPELLEES,
v.
NANCY B. BEECHER, ET AL.,
DEFENDANTS, APPELLEES.

CIVIL SERVICE COMMISSION, ET AL.,
DEFENDANTS APPELLANTS.

Judgment

Entered August 31, 1983

These causes came on to be heard on remand from the United States Supreme Court and was argued by counsel.

Upon consideration whereof, It [*sic*] is now here ordered, adjudged and decreed as follows:

The District Court's order of August 7, 1981, is vacated and the causes are remanded to that court with directions to dismiss as moot the motion for modification consistent with the opinion filed this day.

No costs.

By the Court:

FRANCIS P. SCIGLIANO

Clerk.

Appendix C.

UNITED STATES CONSTITUTION.

Article III, § 2, Cl. 1.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

MASSACHUSETTS ACTS OF 1982.

Chapter 190.

AN ACT ESTABLISHING THE CITY OF BOSTON FUNDING LOAN ACT
OF NINETEEN HUNDRED AND EIGHTY-TWO AND THE MASSACHU-
SETTS CONVENTION CENTER AUTHORITY.

SECTION 25. Notwithstanding the provisions of any general or special law to the contrary, the appointing authority of the police department and the fire department of the City of Boston shall reinstate to active service as of the effective date of this act any uniformed officer of either department who was in service or on injured leave as of July first, nineteen hundred and eighty-one, or was temporarily suspended as of July first,

nineteen hundred and eighty-one, which suspension has expired, except for disciplinary reasons consistent with chapter thirty-one of the General Laws or in pursuit of an involuntary retirement under section seven of chapter thirty-two of the General Laws and shall not thereafter terminate any such officer or take any other personnel action the effect of which would be to separate such officer from active service in the future for lack of funds. During the fiscal years ending June thirtieth, nineteen hundred and eighty-two and June thirtieth, nineteen hundred and eighty-three the City of Boston shall maintain in the police department and the fire department of the City of Boston, either in active service, training or recruitment, no fewer uniformed employees than the total of the number in service or on injured leave on March twenty-fourth, nineteen hundred and eighty-two plus the number of uniformed employees eligible for reinstatement pursuant to this section, without regard to the number of eligible uniformed employees who actually return to service in either department. Nothing herein shall prevent an employee of either department from being placed in [*sic*] injured leave under the provisions of section one hundred and eleven F of chapter forty-one of the General Laws. The mayor shall annually request and the city council shall annually appropriate sufficient amounts to the respective departments to cover the costs imposed by this section, but nothing in this section shall be construed to permit the officers in charge of said departments to expend funds in excess of available appropriations in violation of the city charter.